Mohd Salim bin Said & Ors v Tang Pheng Kee & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1436–06 OF 2012 AND P-02–1437–06 OF 2012

CLEMENT SKINNER, LIM YEE LAN AND ZAWAWI SALLEH JJCA

20 DECEMBER 2013

Evidence — Best evidence — Document — Faraid certificates issued by Shariah Court — Whether certificates best evidence to prove claimants were rightful beneficiaries of estate of original deceased Muslim owners — Whether High Court should have accepted evidence of certificates — Whether possession of original deeds by claimants further corroborated claimants' relationship to original owners — Whether lands fraudulently transferred by using forged power of attorney — Whether transfers void

This case concerned the fraudulent transfer of three pieces of land ('Lots 584, 585 and 277') owned jointly by Sahid bin Abbas ('Sahid'), Mah bt Yasin ('Mah') and Yam bt Yasin ('Yam') to Tan Pheng Kee and Woon Ming Chye ('Tan and Woon') and also to Pang Goh Kiong ('Pang') who were among the respondents in the appeals herein. Whilst Lot 277 was purportedly a direct transfer to Tan & Woon, Lots 584 and 585 were first transferred to Pang's co-respondent in the appeal, Ramli bin A Karim ('Ramli') who later transferred the lands to Pang. The memorandum of transfer in respect of all the three lots were purportedly signed by Sahid for himself and on behalf of Mah and Yam pursuant to a power of attorney ('PA') dated in January 2000 which Mah and Yam had purportedly given to Sahid. The appellants, all beneficiaries of the original registered owners of the three lots, applied to the High Court to set aside all the transfers and to reinstate the names of the original owners in the register. They contended that Sahid died sometime in 1938/1939 long before Mah and Yam died in 1964 and 1981 respectively. Hence, Mah and Yam could not have created the PA in Sahid's favour; neither could Sahid have executed the memorandums of transfers as vendor in respect of the three lots during the years 2000 and 2002. The appellants said not only were the PA and memorandums of transfers forgeries, Pang's contention that he was a bona fide purchaser for valuable consideration of Lots 584 and 585 from Ramli could not stand as he was not such a purchaser. The High Court dismissed the appellants' claim holding that they had failed to prove fraud and forgery because they had (a) failed to establish their relationship to the original registered owners of the three lots and (b) failed to prove that the original owners were, in fact, dead when the PA was executed. In their instant appeal,

A the appellants said that based on the adduced evidence the High Court's verdict was perverse.

Held, allowing the appeals with costs and setting aside the decision of the High Court:

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(1) The determination of who were the beneficiaries of the deceased persons in the instant case was an Islamic law issue within the Shariah Court's jurisdiction. The faraid certificates stated the names of the deceased, their time of death, the beneficiaries and their entitlement. In addition to testifying that they were the beneficiaries under Sahid's, Mah's and Yam's estate, the appellants had produced the death certificates of Mah and Yam and the faraid certificates issued by the Shariah Court in respect of Sahid and Mah. The certificates were the best evidence in proving the appellants were the rightful beneficiaries of the deceased. The Shariah Court's order should have been accepted by the High Court (see paras 23–25).

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(2) Apart from the production of the faraid certificates, the second appellant, Halimah bt Din, who was Mah's daughter, had produced before the High Court the original copy of the 1930 deed of gift to Mah and Yam by their mother, Esah, of her share in the three lots. This deed was left in Halimah's custody by her late mother. Possession of the original deed was strong corroboration of Halimah's evidence of her relationship to Mah (see para 25).

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(3) The death certificates showed without doubt that Mah and Yam died in 1964 and 1981 respectively. The PA that was used to transfer the lots to Tan, Woon and Ramli was a forged document as the donors and donee were no longer alive when the PA was created. The instrument of transfer purportedly signed by the deceased was a void instrument being a document of transfer that bore a forged signature. Tan and Woon's title was, therefore, to be set aside (see para 31).

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(4) It was incumbent upon Pang to prove he acquired Lots 584 and 585 in good faith and for valuable consideration. The particulars in the transfer documents were false. Neither Sahid, as the first transferor, nor Ramli, as the second transferor, received the purported consideration; Pang was unable to prove he had paid the purchase price and the whole transaction was done in undue haste. On the face of the transfer form Pang purchased the lands from Ramli; but in fact, he bought the land from Sahid. He concluded the sale without proper investigation into the title or of the person claiming to be the proprietor. Pang took a risk, but it could not be at the appellants' expense. There was no negligence on the appellants' part. As between two innocent persons, one of whom must suffer the consequences of breach of trust, the one who made it possible by his act of confidence must bear the loss (see paras 32, 38 & 40–42).

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[Bahasa Malaysia summary

Kes ini adalah berkenaan pindah milik secara penipuan ke atas tiga bidang tanah ('Lot 584, 585 dan 277') yang dimiliki bersama oleh Sahid bin Abbas ('Sahid'), Mah bt Yasin ('Mah') dan Yam bt Yasin ('Yam') kepada Tan Pheng Kee dan Woon Ming Chye ('Tan dan Woon') dan juga kepada Pang Goh Siong ('Pang') yang merupakan responden-responden dalam rayuan ini. Lot 277 dikatakan telah dipindah milik secara langsung kepada Tan dan Woon, manakala Lot 584 dan 585 telah terdahulunya dipindah milik kepada responden bersama iaitu Pang dalam rayuan ini, Ramli bin A Karim ('Ramli') yang kemudiannya memindah milik tanah-tanah tersebut kepada Pang. Memorandum pindah milik bagi ketiga-tiga lot tanah dikatakan telah ditandatangani oleh Sahid sendiri dan bagi pihak Mah dan Yam berikutan surat kuasa wakil ('PA') bertarikh Januari 2000 yang mana Mah dan Yam telah berikan kepada Sahid. Perayu-perayu, kesemuanya benefisiari kepada pemilik asal berdaftar kepada ketiga-tiga lot, memohon kepada Mahkamah Tinggi untuk mengenepikan kesemua pindah milik dan meletakkan semula nama-nama pemilik asal di dalam mereka berhujah bahawa Sahid meninggal dunia pada lebih kurang dalam tahun 1938/1939, lama sebelum Mah dan Yam meninggal dunia, masing-masing pada tahun 1964 dan 1981. Oleh itu, Mah dan Yam tidak mungkin membuat PA memihak kepada Sahid; Sahid juga tidak mungkin memeterai memorandum-memorandum pindah milik sebagai penjual bagi ketiga-tiga lot antara tahun 2000 dan 2002. Perayu-perayu menghujahkan bahawa bukan sahaja PA dan memorandum-memorandum pindah milik tersebut adalah satu pemalsuan, hujahan Pang bahawa dia adalah pembeli bona fide bagi balasan yang bernilai iaitu Lot-Lot 584 dan 585 daripada Ramli tidak mapan kerana dia bukanlah pembeli sedemikian. Mahkamah Tinggi menolak tuntutan perayu-perayu dengan memutuskan bahawa mereka gagal membuktikan penipuan dan pemalsuan kerana mereka gagal membuktikan hubungan dengan pemilik asal berdaftar ketiga-tiga lot; dan gagal membuktikan bahawa pemilik asal sebenarnya telah meninggal dunia apabila PA dikuatkuasakan. Dalam rayuan ini, perayu-perayu menghujahkan bahawa berdasarkan keterangan yang dikemukakan, keputusan Mahkamah Tinggi adalah tidak tepat.

Diputuskan, membenarkan rayuan-rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Penentuan siapakah benefisiari-benefisiari si mati dalam kes ini adalah isu undang-undang Islam di bawah bidang kuasa Mahkamah Syariah. Sijil faraid menyatakan nama-nama si mati, masa kematian mereka, benefisiari-benefisiari dan bahagian-bahagian mereka. Di samping memberi testimoni bahawa mereka adalah benefisiari-benefisiari estet Sahid, Mah dan Yam, perayu-perayu telah mengemukakan sijil-sijil kematian Mah dan Yam dan sijil-sijil faraid yang dikeluarkan oleh Mahkamah Syariah bagi Sahid dan Mah. Sijil-sijil tersebut adalah

keterangan terbaik untuk membuktikan bahawa perayu-perayu adalah benefisiari-benefisiari sebenar si mati. Perintah Mahkamah Syariah sepatutnya diterima oleh Mahkamah Tinggi (lihat perenggan 23–25).

(2) Di samping pengemukaan sijil-sijil faraid, perayu kedua, Halimah bt Din, yang merupakan anak perempuan Mah, telah mengemukakan di Mahkamah Tinggi, salinan asal surat ikatan pemberian kepada Mah dan Yam daripada ibu mereka, Esah, akan bahagian mereka dalam ketiga-tiga lot. Surat ikatan ini ditinggalkan dalam jagaan Halimah oleh arwah ibunya. Milikan surat ikatan tersebut adalah sokongan kuat kepada keterangan Halimah tentang hubungannya dengan Mah (lihat perenggan 25).

(3) Sijil-sijil kematian yang dikemukakan, tanpa ragu-ragu lagi menunjukkan bahawa Mah dan Yam masing-masing telah meninggal dunia pada 1964 dan 1981. PA yang digunakan untuk memindah milik lot-lot tersebut kepada Tan, Woon dan Ramli adalah dokumen yang telah dipalsukan kerana pemberi dan penerima sudah meninggal dunia semasa PA tersebut dibuat. Surat cara pindah milik yang dikatakan ditandatangani oleh si mati adalah surat cara yang tidak sah kerana dokumen pindah milik mempunyai tandatangan palsu. Hak milik Tan dan Woon, oleh itu, diketepikan (lihat perenggan 31).

(4) Adalah menjadi kewajipan Pang untuk membuktikan bahawa dia memperolehi Lot 584 dan 585 secara suci hati dan bagi satu balasan yang bernilai. Butir-butir dalam dokumen pindah milik adalah salah. Sahid, sebagai pemindah pertama mahupun Ramli, sebagai pemindah kedua, tidak menerima balasan yang dikatakan; Pang gagal membuktikan bahawa dia telah membayar harga belian dan kesemua transaksi dilakukan dengan tergesa-gesa. Pada dasar borang pindah milik, Pang membeli tanah-tanah tersebut daripada Ramli; tetapi realitinya, dia membeli tanah-tanah tersebut daripada Sahid. Dia menyimpulkan jualan tanpa siasatan yang betul terhadap hak milik atau orang yang mendakwa dirinya sebagai pemilik. Pang mengambil risiko, tetapi ia bukanlah salah perayu-perayu. Tiada kecuaian di pihak perayu-perayu. Oleh kerana keduanya adalah individu-individu yang tidak bersalah, salah seorang mesti menanggung akibat pecah amanah, orang yang menjadikannya mungkin melalui tindakan yakinnya yang harus menanggung kerugian (lihat perenggan 32, 38 & 40–42).]

Notes

For cases on document, see 7 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 420–421.

Cases referred to

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 536, CA (refd)

Chiew Lip Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310; [1999] 5 CLJ 112, HC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)

State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589; [2005] 2 CLJ 167, CA (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal representative of Maniam a/l Kathan, deceased) & Anor [2011] 7 MLJ 326; [2011] 4 CLJ 215, HC (refd)

Watt (or Thomas) v Thomas [1947] 1 All ER 582, HL (folld)

Zaharah bt A Kadir (acting as the authorised representative of Abdul Kadir bin Ami, deceased) v Ramunia Bauxite Pte Ltd & Anor [2012] 1 MLJ 192; [2011] 1 LNS 1015, CA (refd)

Legislation referred to

Administration of Islamic Religious Affairs Enactment (State of Penang) (repealed by Enakmen Pentadbiran Agama Islam (Negeri Pulau Pinang) 2004) 1993 s 53

Appeal from: Civil Suit No 22–317 of 2007 (High Court, Pulau Pinang)

M Thayalan (Fathima Idris with him) (Idris & Assoc) for the appellant.

Rashpal Singh (Rashpal Singh & Co) in Civil Appeal No P-02–1436–06 of 2012 for the respondent.

Surendran a/l Suppiah (Surendran &Thiru) in Civil Appeal No P-02–1437–06 of 2012 for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us, filed by the appellants against the decision of the learned judicial commissioner ('JC') of the High Court of Penang dated 23 May 2012, in which he had dismissed the appellants' claim, inter alia, for orders from the court to rectify the register document of title to expunge the fraudulent transfers of 8 acres of land owned by the appellants' family and to reinstate the names of the original owners.

[2] In order to put these appeals in proper perspective, it is apposite to state the nature of reliefs sought by the appellants:

Appeal No P-02–1436–06 of 2012

(a) Deklarasi bahawa pindah milik peserahan No: 471/2002 bertarikh 26.03.2002 daripada Sahid kepada Defendan-Defendan yang melibati tanah Lot 277, Mukim 10, Daerah Barat Daya, Bukit Sungai Ara, Pulau Pinang, terkandung dalam Geran Mukim No 332 (Lot tersebut) adalah mansuh dan tidak berkesan;

(b) Bahawa Sahid, Sahid B Abbas, Mah Bt Yasin dan Yam Bt Yasin, simati-simati, adalah pemilik berdaftar Lot tersebut;

(c) Bahawa Pentadbir Tanah, Daerah Barat Daya, Pulau Pinang, dan/atau Pendaftar Surat-surat Hakmilik Tanah:

(i) Membatalkan nama Tan Pheng Kee dan Woon Ming Chye sebagai pemilik Lot 277, Mukim 10, Daerah Barat Daya, Bukit Sungai Ara, Pulau Pinang, terkandung dalam Geran Mukin No 332 di dalam daftar dokumen hakmilik; dan

(ii) Memulihkan nama-nama Sahid, Sahid B Abbass, Mah Bt Yasin dan Yam Bt Yasin simati-simati, sebagai pemilik-pemilik berdaftar tanah Lot 277, Mukim 10, Daerah Barat Daya, Bukit Sungai Ara, Pulau Pinang, terkandung dalam Geran Mukim No 332 dengan membuat endorsmen-endorsmen yang sesuai ke atas daftar dokumen hakmilik dan ke atas semua dokumen-dokumen yang relevan.

(d) Suatu perintah bahawa dokumen hakmilik keluaran atau apa-apa salinan hakmilik sehubungan tanah di dalam Lot 277, Mukim 10, Daerah Barat Daya, Bukit Sungai Ara, Pulau Pinang, terkandung dalam Geran Mukim No 332 di dalam milikan Responden-Responden diserah balik oleh Responden-Responden kepada Pentadbir Tanah, Daerah Barat Daya, Pulau Pinang, dan/atau Pendaftar Surat-surat Hakmilik Tanah untuk dibatalkan.

Appeal No P-02–1437–06 OF 2012

(a) Deklarasi bahawa pindah milik peserahan No: 616/2000 bertarikh 26-09-200 daripada Sahid kepada Responden Pertama dan pindah milik peserahan No: 521/2003 serta 522/2003 kedua-dua bertarikh 18.4.2003 daripada Responden Pertama kepada Responden Kedua yang melibati tanah-tanah No Lot 584, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 334 dan No Lot 585, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 335 ('Lot-lot tersebut') adalah mansuh dan tidak berkesan;

(b) Bahawa Sahid, Sahid B Abbass, Mah Bt Yasin dan Yam Bt Yasin, simati-simati, adalah pemilik-pemilik berdaftar Lot-Lot tersebut;

(c) Bahawa Pentadbir Tanah, Daerah Barat Daya, Pulau Pinang, dan/atau Pendaftar Surat-surat Hakmilik Tanah:

(i) Membatalkan nama Pang Goh Kiong sebagai pemilik tanah-tanah No Lot 584, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 334 dan No Lot 585 Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 335 di dalam daftar dokumen hakmilik; dan

(ii) Memulihkan nama-nama Sahid, Sahid B Abbass, Mah Bt Yasin dan Yam Bt Yasin, simati-simati, sebagai pemilik-pemilik berdaftar tanah-tanah No Lot 584, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 334 dan No Lot 585, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 335, dengan membuat endorsmen-endorsmen yang sesuai ke atas daftar dokumen hakmilik dan ke atas semua dokumen-dokumen yang relevan;

(d) Suatu perintah bahawa dokumen hakmilik keluaran atau apa-apa salinan hakmilik sehubungan tanah-tanah No Lot 584, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 334 dan No Lot 585, Mukim 10, Daerah Barat Daya, Bukit Relau, Pulau Pinang, terkandung dalam Geran Mukim 335, di dalam milikan Defendan Kedua diserah balik oleh Defendan Kedua kepada Pentadbir Tanah, Daerah Barat Daya, Pulau Pinang, dan/atau Pendaftar Surat-surat Hakmilik Tanah untuk dibatalkan.

[3] Since both appeals involve the same appellants and concern common question of fact and law, we heard them together.

[4] At the conclusion of the arguments, we find merit in the appeals. Consequently, we allowed the appellants' appeal and set aside the decision of the JC with costs.

[5] Now, we give our reasons.

FACTS OF THE CASE

[6] For the purpose of these appeals, a brief account of the salient facts will suffice. Sahid bin Abbas ('Sahid') and Esah bt Abbas ('Esah') had acquired a piece of land (Lot 21 comprised in statutory grant No 4341 dated 24 November 1893) by virtue of a deed of conveyance dated 25 August 1921 as joint tenants.

[7] Lot 21 was subdivided into Lot 21(1) and Lot 21(2). Lot 21(2) was

subsequently renumbered as Lot 277. Lot 21(2) was subsequently subdivided and renumbered as Lot 584 and Lot 585.

[8] Esah transferred her share by virtue of a deed of gift dated 14 October 1963 (exh P7) to her daughters, Mah bt Yasin ('Man') and Yam bt Yasin ('Yam'). Their names were added to the interim registers for Lot 21(1), Lot 21(2), Lot 277, Lot 584 and Lot 585.

[9] The second appellant, Halimah bt Din (SP1), is Mah's daugther. On 22 May 2004, she came to know that the properties had been transferred to other parties.

[10] What happened was, on 26 September 2000, Lots 584 and 585, were transferred to Ramli bin A Karim ('Ramli') for a consideration of RM700,000. The memorandum of transfer was purportedly signed by Sahid for himself and on behalf of Man and Yam pursuant to a power of attorney ('PA') dated 28 January 2000 which Mah and Yam had allegedly given to Sahid. On 18 April 2003, Ramli transferred Lots 584 and 585 to Pang Goh Kiong ('Pang') for a consideration of RM 100,000 and RM350,000 respectively.

[11] On 26 March 2002, Lot 277 was transferred to Tan Pheng Kee and Woon Ming Chye ('Tan and Woon') for a consideration of RM400,000. The memorandum of transfer was purportedly signed by Sahid for himself and on behalf of Mah and Yam, pursuant to the PA.

[12] The appellants (beneficiaries of the original registered proprietors) alleged that that the PA and the memorandums of transfer were forged. According to the appellants, the donors to the PA had passed away in 1964 and 1981 respectively and could not have created the PA in favour of Sahid. In fact, Sahid had passed away in 1938/1939 and could not be the vendor who sold the properties to the respondents.

[13] The appellants' complaints were that the transfer of Lot 277 from Sahid to Tan and Woon and the first transfer of Lots 584 and 585 from Sahid to Ramli were fraudulent and obtained by means of forgery.

[14] The appellants further claimed that the second transfer of Lots 584 and 585 from Ramli to Pang ought to be set aside as Pang is not a bona fide purchaser for valuable consideration.

THE APPEAL

[15] The nub of the appellants' submission before us is that the learned JC

fell into error in deciding as he did because he had failed to judicially appreciate the evidence and to make proper assessment of the totality of the evidence whereby a reasonable court which had properly directed itself would not have come to the same conclusion.

[16] Before we embark upon the task of considering the merits or otherwise of the appeals, it is appropriate first to say something concerning the approach of an appellate court in reviewing a trial judge's findings of fact. The principles which have been consistently approved and applied by our courts when required to review a trial judge's findings of fact are indeed as stated in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582. The opinions of Their Lordships are oft quoted before our courts in such cases and some extracts from their judgments bear repeating here. In general terms, Viscount Simon said:

> … an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

[17] In those cases where the appellate tribunal is disposed to differ from the trial judge's findings, Lord Thankerton had this to say at p 587:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:
>
> (a) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> (b) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (c) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence,

A may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court …

(d) It may be well to quote the passage from the opinion of Lord Shaw in *Clarke v Edinburgh & District Tramways Co* (15) (1919 SC (HL), 35, 37] which was quoted with approval by Lord Sankey, LC, in *Powell v Streatham Manor Nursing Home (1)* [1935] AC 250). Lord Shaw said:

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In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

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D (see also *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *Zaharah bt A Kadir (acting as the authorised representative of Abdul Kadir bin Ami, deceased) v Ramunia Bauxite Pte Ltd & Anor* [2012] 1 MLJ 192; [2011] 1 LNS 1015).

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[18] Upon careful perusal of the appeal records, and after having heard from the parties at great length, we are of the considered view that this is a case in which appellate interference is warranted.

F ISSUES

[19] The main issues that called to be decided by this court in these appeals are as follows:

G (a) whether the power of attorney dated 28 January 2000, the memorandums of transfer dated 26 September 2000 and 26 March 2002 were forged; and

(b) whether Pang is a bona fide purchaser.

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[20] Each issue will be discussed in detail below.

First issue

I **[21]** The learned JC had started off on the right footing by stating that in civil cases, the standard of proof for fraud is beyond reasonable doubt and the standard of proof in respect of forgery is on balance of probabilities. According to the learned JC, the appellants pleaded both fraud and forgery in their statement of claim.

[22] However, the learned JC found that on the evidence adduced before the court, the appellants had not proved fraud and forgery. His Lordship's finding was premised on two grounds: firstly, the relationship between the original registered proprietors and the appellants were not established, and secondly, the appellants failed to prove that the original registered proprietors were in fact deceased when the PA was executed.

[23] With respect, we are of the considered view that the learned JC did not properly evaluate the evidence on record. The appellants gave oral evidence that they are the beneficiaries of Sahih, Mah and Yam's estate. They also produced the death certificates of Mah and Yam, and the faraid certificates issued by the Shariah Court in respect of Sahid and Mah.

[24] The particulars stated in the faraid certificates are the name of the deceased person, the time of death, the beneficiaries and their entitlement. It is trite that the determination of the beneficiaries of the deceased person who professed the religion of Islam is an Islamic law issue within the jurisdiction of the Shariah Court. Upon the proof of death, the Shariah Court will hear from the parties with alleged interest in the estate and determine who among them were the beneficiaries and the apportionments they were entitled to. Section 53 of the Administration of Islamic Religious Affairs Enactment (State of Penang) 1993 makes provision for such an application:

> If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled.

[25] In our considered view, the certificates are the best evidence in proving that the appellants are in fact the rightful beneficiaries of the deceased. An order made by a court of competent jurisdiction after due inquiry as to who are the beneficiaries of the deceased's estate should have been accepted by the learned JC. Further, possession of the original deed of gift is a strong corroboration of SP1's evidence of her relationship to Mah. The second appellant produced the original copy of the 1930 deed of gift by Esah to Mah and Yam which was left in her custody by her late mother.

[26] In his judgment, the learned JC subjected the appellants' evidence to the acid test of probability. His Lordship found several discrepancies with regards to the particulars of Mah and Yam in their death certificates, SP1's birth

certificate, the title deeds and the PA as follows:

(a) there was a difference in the spelling of one letter in the name of SP1's grandfather, in SP1's birth certificate and Mah's death certificate ie Mah bt Yasin and Mah bt Jasin; and

(b) there was a difference in the spelling of one letter in the name of Ya'akub bin Abdullah's (SP3) grandfather, in Yah's death certificate and the title deeds ie Yam bt Jasin and Yam bt Yasin.

[27] We are mindful that there may appear to be some confusion over the spelling of the names which could be an inadvertent error. With the production of the death certificates, we have no doubt that Mah and Yam had passed away in year 1964 and 1981 respectively. Looking at this matter in the broader sense, it is clear that both Mah and Yam had resided at the same address when they received the gift from Esah, up till their demise. The appellants' family members have been in continuous possession of the land and enjoying the fruits thereof and paying quite rent. In addition, there is no contrary evidence to suggest that Mah bt Yasin and Mah bt Jasin and Yam bt Yasin and Yam bt Yasin are two different persons.

[28] The learned JC further found that the appellants had failed to rebut the existence of one Sahid@Sahid bin Abbass (IC 3105617/270614–07–5077). With respect, His Lordship appears to have completely overlooked the inherent probabilities of the case. Upon carefully scrutiny of the PA and memorandum of transfers, we found that the donee and the transferor's name is stated as Sahid@Sahid bin Abbass IC No 3105617 or Sahid@Sahid bin Abbas No KP 270614–07–5077.

[29] The 12 digit numbering system in the identification card was introduced since 1991. It is generally accepted that the first six digits represent the card holder's birth date in the format of 'YYMMDD'. It can be concluded that Sahid@Sahid bin Abbass was born in 1927. As we have alluded earlier, Sahid acquired the land in 1921 vide the deed of conveyance dated 25 August 1921. It is impossible for a person to acquire land before he was even born. The vital piece of document was readily available before the High Court and it is abundantly clear that the purported donee and transferor could not be the actual Sahid but a rogue.

[30] The learned JC reasoned that if indeed the PA was a forgery, then, the appellants should have called the commissioner for oath who attested to the PA to testify in court. With respect, we disagree. In such a situation, the burden of proof shifts to the transferee to show due execution of the PA (see *Chiew Lip*

Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310; [1999] 5 CLJ 112;*Tiagaraja Palaniandy v Moganadas Maniam & Anor* [2011] 7 MLJ 326; [2011] 4 CLJ 215).

[31] Based on the above reasons, it is our finding that the PA that was used as an instrument to effect the transfer of the said lands to Tan, Woon and Ramli is a forged document as the donors and donee were no longer alive when the PA was created. The instrument of transfer purportedly signed by the deceased persons would nevertheless be a void instrument being a document of transfer bearing a purported forged signature. Therefore, Tan and Woon's title is to be set aside (see *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269).

Second issue

[32] The appellants are also challenging the subsequent transfer of Lots 584 and 585 from Ramli to Pang. Pang has pleaded in his defence that he is a bona fide purchaser for value. Therefore, it is incumbent upon Pang to prove that he acquired the land in good faith and for valuable consideration. In *Tan Yin Hong*, Zaki Azmi CJ had this to say:

> Even if C is in the same position as B, subsection (3) (of the National Land Code) does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any little or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

[33] We shall now assess the evidence relating to the second transfer of Lots 584 and 595 to ascertain if Pang had, in the particular circumstances of this case, discharge his burden and whether there is 'absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction' (see *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589; [2005] 2 CLJ 167 (CA)).

[34] In year 2000, Azli (claiming to be Sahid's nephew) had approached Pang offering to sell the three plots of land. However, Pang did not have the finances to purchase the property at that material time. Later, Pang had introduced Woon to Azli and Lot 277 was subsequently transferred to Woon. Lots 584 and 585 were subsequently transferred to Ramli at the price of RM700,000 for both lots but no consideration was paid.

[35] Then, on 18 April 2003, Ramli entered two sale and purchase agreements with Pang to sell Lots 584 and 585. The purchase price was RM100,000 and RM350,000 respectively. Pang claimed that he paid RM50,000 to Ramli as broker fees and the purported consideration to Azli, in instalments.

[36] Learned counsel appearing for Pang argued that the evidence adduced was sufficient to establish that Pang is indeed a bona fide purchaser for value. He placed his reliance on the execution of the sale and purchase agreement and also the payment of the purchase price.

[37] With respect, the argument is devoid of any merit. In the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 536, Raus Sharif JCA (as His Lordship then was) had this to say:

> … An existence of a sale and purchase agreement and the payment of purchase price in full cannot be the only indicator to show whether a person is a bona fide purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.

[38] The facts of this case are particularly disturbing. Firstly, the particulars contained in the transfer instruments were false. Sahid, vendor in the first transfer, and Ramli, vendor in the second transfer, did not receive the purported consideration. Ramli explained that the first transfer was done ostensibly to obtain a loan. However, we found that the explanation was unsatisfactory. No evidence was adduce to show any effort by Ramli or Azli to obtain a loan.

[39] Secondly, Pang claimed that he paid the purchase price by way of instalments to Azli. However, Pang did not give any particulars as to how the instalments were paid eg the amount of each instalment and the time frame. Further, no documentary evidence was adduce to show that payments were indeed made.

[40] Thirdly, the whole transaction was done in undue haste. The purchase price for the first transfer for both lots of land was RM700,000. The purchase price for the second transfer for both lots of land was RM450,000. No doubt he had every right to take advantage of the low price that was offered to him but he took it with a risk.

[41] Pang knew all along that Ramli did not pay the purchase price for the first transfer. On the face of the transfer form, he purchased the land from Ramli; but in actual fact, he purchased the land from Sahid. He concluded the sale without any proper investigation into the title or of the person claiming to

be the proprietor. In the case of *Au Meng Nam*, the Court of Appeal stated that a purchaser of good faith does not include a purchaser who is careless or who had been negligent.

[42] Therefore, it is our considered view that when Pang embarked on taking such a risk, it cannot be at the expense of the appellants. In the instant case, without the appellants' knowledge and consent, and without even a trace of negligence on their part, the PA and instruments of transfer were forged. There is a legal maxim — as between two innocent persons, one of whom must suffer the consequences of the breach of trust, the one who made it possible by his act of confidence must bear the loss.

CONCLUSION

[43] For all the above reasons, the appeals should be allowed with costs. Consequently, we set aside the order of the learned JC.

Appeals allowed with costs and decision of the High Court was set aside.

Reported by Ashok Kumar